

WD NO. 61687

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

MISSOURI STATE BOARD OF REGISTRATION
FOR THE HEALING ARTS,

Relator

vs.

THOMAS J. BROWN, III
CIRCUIT JUDGE, DIVISION I
CIRCUIT COURT OF COLE COUNTY,

Respondent.

**BRIEF OF RELATOR MISSOURI STATE BOARD OF REGISTRATION
FOR THE HEALING ARTS IN SUPPORT OF WRIT OF PROHIBITION**

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TABLE OF CONTENTS

Table of Contents.....	2
Table of Authorities	3
Cases.....	3
Statutes	4
Jurisdictional Statement	5
Statement of Facts	6
Points Relied On	11
Point I.....	11
Point II.....	11
Point III.....	12
Argument.....	13
Point I	13
Point II.....	21
Point III	25
Conclusion and Request for Relief	26
Certificate of Service.....	27

TABLE OF AUTHORITIES

<i>Artman v. State Bd. of Registration for Healing Arts,</i>	
918 S.W.2d 247 (Mo. banc 1996)	15
<i>Big Piney v. MHTC</i> , 620 S.W.2d 66 (Mo. App. E.D. 1981)	24
<i>Bouquett v. Ohio State Medical Board</i> , 704 N.E.2d 583 (1997)	
.....	20
<i>Burgdorf v. Board of Police Commissioners,</i>	
936 S.W.2d 227 (Mo. App. E.D. 1996)	11, 16
<i>Butz v. Glover Livestock</i> , 411 U.S. 182, 93 S.Ct. 1455 (1973)	19
<i>Comfort v. County Council of St. Louis County,</i>	
822 S.W.2d 460 (Mo. App. E.D. 1991)	11, 22, 23
<i>Consumer Contract Co. v. State Dept. of Rev.,</i>	
592 S.W.2d 782, (Mo. banc 1980).....	12, 23
<i>Cox v. U.S. Dept. of Agriculture</i> , 925 F.2d 1102 (8 th Cir. 1991).....	20
<i>FCC v. WOKO</i> , 329 U.S. 223, 227-28 (1946)	19, 20
<i>Hernandez v. State Bd. of Registration for Healing Arts</i>	
936 S.W.2d 894, (Mo.App. W.D. 1997)	24
<i>Linton v. Missouri Veterinary Medical Board,</i>	
998 S.W.2d 513 (Mo banc 1999)	11, 15, 18
<i>M.M. v. State Bd. of Accountancy</i> , 728 S.W.2d 726 (Mo.App. E.D. 1987).....	11, 17
<i>Missourians for Tax Justice Education Projected v. Holden,</i>	

959 S.W.2d 100 (Mo. banc 1998)	16
<i>State Board of Registration for the Healing Arts v. Levine,</i>	
808 S.W.2d 440 (Mo.App. W.D. 1991)	15, 23
<i>State Board of Registration for the Healing Arts v. Masters,</i>	
512 S.W.2d 150, Mo.App. 1974)	15, 23
<i>State v. Young,</i> 695 S.W.2d 882, 883 (Mo. banc 1985)	15
<i>State ex rel. Clinton Area Vocation School v. Dandurand,</i>	
766 S.W.2d 169 (Mo. App. W.D. 1989)	24
<i>State of Missouri ex rel. Hurwitz v. North,</i>	
271 U.S. 40, 46 S.Ct. 384, 385, 70 L.Ed. 818 (Mo. 1926).	15
<i>Sullivan County v. State Tax Comm'n,</i> 513 S.W.2d 452 (Mo. 1974)	24
<i>Peters v. United Consumers Club,</i> 786 S.W.2d 192 (Mo. App.E.D. 1990)	11, 21
<i>United Van Lines, Inc. v. U.S.,</i> 545 F.2d 613, 616 (8 th Cir. 1976)	20
<i>Vaughn, M.D. v. State Medical Board of Ohio,</i> 1995 WL 704753.....	20
<i>Yoder by Larson v. Horton,</i> 678 S.W.2d 901, 904 (Mo. App. E.D. 1984)	11, 21
Section 326.310, RSMo	17
Section 334.100, RSMo	8, 17
Section 536.110, RSMo	5
Section 536.140, RSMo	5, 8 , 23, 24
Section 621.145, RSMo	5

JURISDICTIONAL STATEMENT

This proceeding in prohibition is brought and maintained to compel Respondent to rescind the Order and Judgment, entered on May 29, 2001, in the underlying case of *Mark M. Tendai, M.D., Petitioner, v. Board of Registration for the Healing Arts, Respondent*, Case No. 00CV323854, before the Circuit Court of Cole County. The Western District Court of Appeals is the proper court for filing this writ pursuant to Sections 536.110.3, 536.140.6, and 621.145, RSMo, because it has jurisdiction over judicial review from the underlying case. Pursuant to Rule 84.22 *et seq.* of the Missouri Rules of Civil Procedure, this proceeding became timely on June 11, 2002, at which time the Missouri Supreme Court entered its Per Curium Opinion in matter entitled *Mark M. Tendai, M.D., Petitioner, v. Board of Registration for the Healing Arts, Respondent*, Case No. SC 83783, stating that it did not have jurisdiction.

STATEMENT OF FACTS

Relator, the Missouri State Board of Registration for the Healing Arts (ABoard@), is an agency of the State of Missouri created and established pursuant to Section 334.120, RSMo, for the purpose of executing and enforcing provisions of Chapter 334, RSMo. Respondent, the Honorable Thomas J. Brown, III, is the duly appointed, qualified and acting Judge of Division I of the Circuit Court of Cole County, Missouri. This proceeding in prohibition pertains to the Order and Judgment, entered on May 29, 2001, in the underlying case of *Mark M. Tendai, M.D., Petitioner, v. Board of Registration for the Healing Arts, Respondent*, Case No. 00CV323854, before the Circuit Court of Cole County, wherein Respondent in part remanded the case to the Board to make further factual findings. It is the Board's position that Respondent Judge Brown lacked statutory authority, jurisdiction or authority given the record before him and his other determinations. A copy of Respondent's Order and Judgment is attached hereto as Appendix A.

Tendai subsequently filed a Notice of Appeal to the Missouri Supreme Court on July 9, 2001. The Missouri Supreme Court initially accepted jurisdiction of that appeal including Tendai's contention that the discipline imposed on him violated his Equal Protection rights. The appeal stayed the enforcement of any provision of Respondent's Order and Judgment. Had the Missouri Supreme determined that no Equal Protection violation occurred, Respondent's remand would have been overturned. Alternatively, had the Missouri Supreme Court determined that an Equal violation occurred, Respondent's remand would have been mooted. Instead, on June 11, 2002, the Missouri Supreme Court entered its Per Curium Opinion in

Mark M. Tendai, M.D., Petitioner, v. Board of Registration for the Healing Arts, Respondent, Case No. SC 83783, dismissing Tendai's Appeal, dated July 9, 2001, for lack of jurisdiction. A copy of said Order is attached hereto as Appendix B. In dismissing the appeal, the Per Curium Opinion did not address the whether an Equal Protection violation existed or if the Respondent had the statutory authority, jurisdiction or discretion to order the remand for further fact finding. Because the Per Curium Opinion effectively reinstated Respondent's Order and Judgment, this proceeding in prohibition became ripe.

Underlying Case

On May 15, 2000, Relator Board lawfully disciplined the license of Mark M. Tendai, M.D. (ATendai@), for violating provisions of Section 334.100.2, RSMo. A copy of the Board's *Disciplinary Order* is attached hereto as Appendix C. The Board's discipline consisted of a public reprimand and a suspension (for a period of 60 days) Tendai's medical license. The Board's disciplinary action took place after the Missouri Administrative Hearing Commission (ACommission@) issued findings of fact and conclusions of law on September 2, 1999, in support of discipline; thereby authorizing the Board to hold a disciplinary hearing on April 28, 2000, to consider the degree of discipline to impose as prescribed under Section 334.100.4. A copy of the Commission's Findings of Fact and Conclusions of Law is attached hereto as Appendix D.

Tendai then filed a *Petition for Review* pursuant to Section 536.140, RSMo, wherein he asked Respondent set aside the prior findings of fact and conclusions of law entered by the Commission authorizing the Board to impose discipline against Tendai's medical license for

violating provisions of Section 334.100.2, RSMo, and to set aside the subsequent Disciplinary Order entered by Relater Board. Tendai's *Petition for Review* was assigned to Respondent for adjudication as prescribed in Section 536.140, RSMo. Tendai asserted that the Commission's findings and conclusions, and the Board's Disciplinary Order violated various provisions of Section 536.140.2. Included therein was Tendai's assertion that he received disparate punishment in violation of his equal protection rights.

As prescribed under Section 536.140.2, RSMo 2000, a circuit court inquiry is limited to determining whether the combined decisions of the Commission and the Board were:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Unsupported by competent and substantial evidence upon the whole record;
- (4) For any other reason unauthorized by law;
- (5) Made upon unlawful procedure or without a fair trial; or
- (6) Arbitrary, capricious or unreasonable.

On May 29, 2001, after considering all arguments presented by the parties, Respondent entered his Order and Judgment on the *Petition for Review* affirming the Commission's findings and conclusions in their entirety. At the same time, Respondent affirmed in part, reversed in part and remanded in part the Board's Disciplinary Order. In all aspects, except for the Equal Protection assertion, Respondent appears to affirmed the Board's Disciplinary Order in its entirety. In respect to Tendai's Equal Protection assertion, the claim that other physicians in substantially similar cases prior thereto had received substantially lesser

disciplinary action, Respondent remanded the matter back to the Board for further fact finding stating:

The Board made no findings of fact as to the similarity or dissimilarity of [Tendai]'s case to prior cases cited by [Tendai] at the time of his disciplinary hearing. The Court finds that the Board failed to make findings of fact on this issue, which failure prevents this Court from conducting a review of [Tendai]'s claim. The Board's failure to make the required findings of fact on a material issue constitutes error to the substantial prejudice of [Tendai].

See Appendix A-4.

Section 536.140.5, RSMo 2000, provides that Respondent a circuit court shall render judgment affirming, reversing, or modifying the agency's order.@ A circuit court may order an agency to reconsider the case in the light of the court's opinion and judgment and may Aorder the agency to take such further action as it may be proper to require@ However, Section 536.140.5 prohibits a circuit court from Asubstitut[ing] its discretion for discretion legally vested in the agency.@

Tendai subsequently moved to have the Respondent's Order and Judgment modified on June 21, 2001. On June 29, 2001, Respondent denied that motion. Tendai then filed a Notice of Appeal to the Missouri Supreme Court on July 9, 2001. The Missouri Supreme Court initially accepted jurisdiction of that appeal, which in the Board's opinion included the substantive question of whether an equal protection violation had occurred. (See, Brief of Appellant Mark M. Tendai, Point Relied On III, *Tendai v. State Board of Registration for the Healing Arts*, before the Missouri Supreme Court, Case. No. SC83783). It was the Board's position that as long as the Supreme Court had jurisdiction there was no basis for it to obtain a writ

in prohibition on the procedural question of whether a circuit court could order a remand for further fact finding on an equal protection question when the record showed only disparate treatment, but no evidence of any evidence of discriminatory conduct.

On June 11, 2002, the Missouri Supreme Court entered its Per Curium Opinion in *Mark M. Tendai, M.D., Petitioner, v. Board of Registration for the Healing Arts, Respondent*, Case No. SC 83783, dismissing Tendai's Appeal, dated July 9, 2001, for lack of jurisdiction. The Per Curium Opinion did not address the substantive question as to whether an Equal Protection violation had occurred. The Per Curium Opinion did not address the procedural question as to whether a circuit court had the jurisdiction or discretion to order a remand for further fact finding when no evidence was presented that evidence had improperly been excluded and when no determination was made that an Equal Protection violation had occurred.

POINTS RELIED ON

- I. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD=S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE JUDGE BROWN EXCEEDED HIS JURISDICTION AND DISCRETION IN THAT HE HAD INSUFFICIENT CAUSE OR REASON TO DETERMINE OR POTENTIALLY DETERMINE THAT THE DISCIPLINE IMPOSED VIOLATED MARK M. TENDAI=S EQUAL PROTECTION RIGHTS OR WAS SOMEHOW WAS DISCRIMINATORY GIVEN THE MERE FACT OTHER LICENSEES RECEIVED DIFFERENT DISCIPLINES.**

Burgdorf v. Board of Police Commissioners,
936 S.W.2d 227, 233-34 (Mo. App. E.D. 1996)

Linton v. Missouri Veterinary Medical Board,
998 S.W.2d 513, 515-16 (Mo banc 1999)

M.M. v. State Bd. of Accountancy,
728 S.W.2d 726 (Mo.App. E.D. 1987).

- II. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD=S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE JUDGE BROWN EXCEEDED HIS STATUTORY AUTHORITY, JURISDICTION AND DISCRETION UNDER SECTION 536.140 AND IS THEREFORE VOID, IN THAT SECTION 536.140 PROVIDES NO BASIS FOR A REVIEWING COURT TO DIRECT THAT AN ADMINISTRATIVE AGENCY MAKE FURTHER FINDINGS BASED ON THE RECORD PRESENTED TO JUDGE BROWN IN THE UNDERLYING CASE.**

Comfort v. County Council of St. Louis County,
822 S.W.2d 460 (Mo. App. E.D. 1991)

Consumer Contract Co. v. State Dept. of Rev.,
592 S.W.2d 782 (Mo. banc 1980)

Yoder by Larson v. Horton,

678 S.W.2d 9010 (Mo. App. E.D. 1984)

Peters v. United Consumers Club,
786 S.W.2d 192, 193 (Mo. App. E.D. 1990)

III. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REMANDED THE BOARD-S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE THE RELIEF SOUGHT HERE IS APPROPRIATE AND ADDITIONALLY THE PER CURIAM ORDER ENTERED IN THE UNDERLYING CASE BY THE MISSOURI SUPREME COURT DID NOT ADDRESS THE ISSUES RAISED HERE AND DOES NOT EXPRESSLY PROHIBIT THE RELIEF SOUGHT.

State ex rel. Chassang v. Mummert,
887 S.W.2d 573, 577 (Mo. banc 1994)

ARGUMENT

I. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE JUDGE BROWN EXCEEDED HIS JURISDICTION AND DISCRETION IN THAT HE HAD INSUFFICIENT CAUSE OR REASON TO DETERMINE OR POTENTIALLY DETERMINE THAT THE DISCIPLINE IMPOSED VIOLATED MARK M. TENDAI'S EQUAL PROTECTION RIGHTS OR WAS SOMEHOW WAS DISCRIMINATORY GIVEN THE MERE FACT OTHER LICENSEES RECEIVED DIFFERENT DISCIPLINES.

In the underlying case, Mark M. Tendai, M.D. (ATendai@) offered evidence at the April 28, 2000 hearing as to numerous other disciplinary cases generated by the Board. These other disciplinary cases imposed discipline that Tendai viewed as less burdensome than the his ultimate discipline B a public reprimand and a 60 day suspension of his medical license. In his *Petition for Review* before Respondent Judge Brown, Tendai argued that his discipline violated his Equal Protection rights. Judge Brown in his *Order and Judgment* made the following determination:

[Tendai]'s *Petition for Review* alleges that the Board's *Disciplinary Order* imposes discipline which violates [Tendai]'s Equal Protection rights, in that other physician in substantially similar cases prior to [Tendai]'s disciplinary hearing had received substantially lesser disciplinary action imposed by the Board. The Board made no findings of fact as to the similarity or dissimilarity of [Tendai]'s case to prior cases cited by [Tendai] at the time of his disciplinary hearing. The Court finds that the Board failed to make findings of fact on this issue, which failure prevents this Court from conducting a review of [Tendai]'s claim. The Board's failure to make the required findings of fact on a material issue constitutes error to the substantial prejudice of [Tendai].

Appendix A-4 (Emphasis is the court's).

A. Judge Brown Exceeded His Jurisdiction and His Discretion.

It is the Board's position that Judge Brown erred and exceeded his authority in reversing the Board's Disciplinary Order regardless of whether the Board made specific findings as to how Tendai's discipline relates to prior Board disciplinary actions. Judge Brown specifically stated that he was not making a determination as to Tendai's Equal Protection assertion. Judge Brown reversed and remanded the case to the Board for to make findings facts justifying its Disciplinary Order in light of the Tendai's Equal Protection assertion. Said action improperly shifted the burden to the Board to show why Tendai's discipline did not violate Equal Protection rights. Under Missouri law, Judge Brown did not have the jurisdiction or discretion to contemplate such action unless and until a prima facie case for Equal Protection was demonstrated. See generally, State ex rel. Chassang v. Mummert, 887 S.W.2d 573, 577 (Mo. banc 1994). Judge Brown could have made a determination that there was no rational basis for Tendai's discipline. Judge could have noted that the lack of findings in the Disciplinary Order supported his determination. However, Judge Brown did not have the jurisdiction or the discretion to require the Board make such findings before he made his determination as to Tendai's Equal Protection claim. Furthermore, it is the Board's position that the record before Judge Brown, even in the absence of any findings of fact by the Board, did not support a determination that Tendai's Equal Protection rights were violated. Therefore, Judge Brown usurped his authority in ordering the remand.

B. Healing Arts Act is Not Per Se Unconstitutional.

Statutes are presumed to be constitutional and will be held to be unconstitutional only if they clearly contravene some constitutional provision. *State v. Young*, 695 S.W.2d 882,

883 (Mo. banc 1985). Doubts will be resolved in favor of constitutionality. *Id.* It was held early on that this section of the Healing Arts Practice Act is not generally a denial of equal protection of the laws or due process. *State of Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 46 S.Ct. 384, 385, 70 L.Ed. 818 (Mo. 1926). It is not enough for a physician challenging the statute governing discipline to show that the statute might operate unconstitutionally in some cases. *Artman v. State Bd. of Registration for Healing Arts*, 918 S.W.2d 247 (Mo. banc 1996). Rather, the physician must show that, as applied to him, the Board used its power in an arbitrary or discriminatory manner. *Id.*

C. Tendai Cannot Show that His Discipline was Arbitrary, Discriminatory or Without Some Rational Basis.

To the Board's knowledge, Tendai does not assert that his situation constitutes a suspect classification for purposes of a strict scrutiny analysis of his Equal Protection rights. Therefore, Tendai had to demonstrate to Judge Brown that there was no rational basis for the Board's discipline. Under Missouri law, Tendai had the burden of showing that disciplining a medical license is not rationally related to any legitimate state interest. *Linton v. Missouri Veterinary Medical Board*, 998 S.W.2d 513, 515-16 (Mo banc 1999). It has long been held in Missouri that the state has a legitimate state interest in regulating the practice of medicine, including the discipline of medical license holders. The primary purpose of statutes authorizing the Board to discipline a physician's license is to safeguard the public health and welfare. *Board of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 442 (Mo.App. W.D. 1991). Once a legitimate interest can be articulated, all that remains is

whether the means chosen . . . is rationally related to achieving that purpose.@ *Linton*, 988 S.W.2d at 516. The fact that the Board Acould have@or Ashould have@done something different is not relevant. As the Supreme Court noted, Aif any statement of facts reasonably may be conceived to justify the means chosen to accomplish that purpose@the action survives judicial review. *Missourians for Tax Justice Education Projected v. Holden*, 959 S.W.2d 100, 103-04 (Mo. banc 1998), quoted in, *Linton* at 515-16.

This is significant because Tendai's main argument is that other licensees received differing discipline. Mere proof that others supervised by a board have received lesser Apunishment,@ without more, does not make out a prima facie case of a denial of equal protection. *Burgdorf v. Board of Police Commissioners*, 936 S.W.2d 227, 233-34 (Mo. App. E.D. 1996). As a matter of law, a board does not have to consider other punishments before imposing discipline. *Id.* So long as discipline is within a board's statutory authority, a board has broad authority to impose whatever discipline it finds appropriate. *Id.* In *Burgdorf*, a police officer was Aallowed to present punishment evidence during the hearing, despite there being no requirement that the Board consider other punishments before it imposes discipline.@ *Id.* at 234. Here, Tendai was able to present evidence to the Board as to how other licensees had been disciplined for conduct, that in Tendai's estimation, was similar to his own. However, Tendai was not able to demonstrate to the Respondent that the Board failed to consider or somehow improperly excluded this evidence.

The Court of Appeals for the Eastern District previously held that the Missouri State Board of Accountancy¹ did not abuse its discretion by imposing a harsher discipline on one licensee than on another. *M.M. v. State Bd. of Accountancy*, 728 S.W.2d 726 (Mo.App. E.D. 1987). There, the licensee appealed an order of the Board of Accountancy revoking his license and presented evidence of other instances where the Board imposed a lesser discipline for conduct that could be construed as more egregious. *Id.*, at 727. The Court of Appeals noted that the mere fact the harshest penalty was imposed here and not in another case, does not, by itself, prove the Board abused its discretion. *Id.* The Court of Appeals held there was competent and substantial evidence on the record to support the Board of Accountancy's order. *Id.* at 727. Here, the Board of Registration for the Healing Arts imposed discipline that was clearly within its discretion and its statutory authority. While Tendai did introduce evidence that the Board, on other occasions, imposed differing penalties; at no time was any evidence introduced that Board, here, acted in an abusive or discriminatory fashion by imposing a public reprimand and a 60day suspension.

¹ The State Board of Accountancy is similar to the State Board of Registration for the Healing Arts in that both Boards are required under Section 621.045, RSMo, to file complaints with the Administrative Hearing Commission, both Boards have several grounds for discipline under Section 334.100 and Section 326.310, respectively, and have similar discretion as to the type of discipline (including public reprimand and suspension) that may be imposed under Section 334.100.4 and Section 326.310.3, respectively.

Similarly in *Linton*, a veterinarian challenged the Veterinary Medical Board's three-examination limit and introduced evidence that other states did not have a similar restriction. The Missouri Supreme Court held that the mere fact that most or even all states have adopted less stringent policies as to who may practice veterinary medicine is not evidence that the policy chosen by our General Assembly is not rationally related to promoting quality veterinary services. 998 S.W.2d at 517.

Here, Tendai offered evidence only that other licensees received differing discipline from the Board. He also asserts in light of the differing discipline there was no rational basis for his discipline of a public reprimand and a sixty day suspension. However, as long as there is some rational basis for the discipline the fact that it differs from prior disciplinary actions is irrelevant. Here, Judge Brown affirmed the Findings of Fact and Conclusions of Law entered by the Commission. The Commission's findings and conclusions were specifically incorporated into the Board's Disciplinary Order. Those findings and conclusions included: a) the fact that Tendai tendered fraudulent "sticky notes" as evidence in a Board proceeding, which appeared to have been made up after the fact and did not reflect the true course of events in patient S.G.'s care; and b) that the Commission did not find Tendai simply negligent in his care of patient S.G, but grossly negligent, incompetent and that Tendai's conduct was harmful to the health of a patient. (Appendix B, p. 6-7, ftnt. 4, 15-18). Certainly, these findings (just to name a few) create a rational basis for Tendai's discipline.

The Commission's findings and conclusions, which Judge Brown affirmed and which the Board relied upon, even quoted the Board's expert witness, Dr. Cameron, who testified that:

“This baby didn’t have to die. This was a preventable death.” (Appendix B, p. 17-18). The Commission concluded that “Tendai’s omission in the treatment of S.G. constitute a gross deviation from the standard of good care and demonstrate a conscious indifference to professional duty.” (Id.). It is a fortunate thing indeed that the Board is rarely presented with findings by the AHC of this level of negligence on the part of a licensee.

Tendai’s conduct, absent Judge Brown’s determination that the Board needed findings that specifically addressed Tendai’s Equal Protection assertion, is distinguishable from that of other disciplinary cases based on his extreme degree of negligence, based on the Commission’s findings that he made up phony evidence in the form of the “sticky notes,” and based on the Commission’s necessarily implied finding that he lied under oath about the circumstances surrounding the treatment of patient S.G. and the creation of the “sticky notes.”

D. Employment of a Sanction Within the Agency’s Authority is a Valid Exercise of Agency Discretion.

The United States Supreme Court has held that an administrative agency does not violate the equal protection clause merely because some sanctions exceed others. “The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.” *Butz v. Glover Livestock*, 411 U.S. 182, 93 S.Ct. 1455 (1973), quoting *FCC v. WOKO*, 329 U.S. 223, 227-28 (1946); see also *Cox v. U.S. Dept. of Agriculture*, 925 F.2d 1102, 1107 (8th Cir. 1991); *United Van Lines, Inc. v. U.S.*, 545 F.2d 613, 616 (8th Cir. 1976). In *Vaughn, M.D. v. State Medical Board of Ohio*, 1995 WL 704753, the Ohio Court of Appeals

considered this point. The court said that "[A]ppellant offered no evidence to support her claim of discrimination other than a list of other physicians who received lesser sanctions. We agree with the court of common pleas that 'the information provided is insufficient for the Court to conclude that the Board violated Appellant's right to equal protection based on a comparison of the discipline of the cited physicians and that of the Appellant.'" *Id.* at * 6. "In an equal protection claim, the alleged victim has the burden of proving discriminatory intent or purpose." *Id.* In *Bouquett v. Ohio State Medical Board*, 704 N.E.2d 583 (1997), the court of appeals said that, as in *Vaughn*, if appellant merely offers a list of other physicians who received lesser sanctions, no equal protection violation is shown. *Id.* at 475-76. Tendai must prove discrimination.

E. Conclusion.

By merely listing out physicians whom he felt received comparatively lesser sanctions, Tendai failed to make out a prima facie case of discrimination and thereby failed to make out a prima facie case of a violation of the Equal Protection Clause. Therefore, Judge Brown had no authority to remand to the Board for the entry of additional findings of fact and conclusions of law because the Board had no legal duty to consider other punishments before it imposed discipline. The legal and appropriate course of action in this case was for Respondent either affirm or reverse outright without prejudice to the Board's right to reconvene and enter a disciplinary order containing the necessary findings. Because the record before Judge Brown showed a rational basis for the Board's action, The Board's Disciplinary Order should have been affirmed in total. Judge Brown's remand for additional findings of facts substitutes his

discretion impermissibly for that of the Board's. Therefore, Judge Brown exceeded his jurisdiction and discretion.

II. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE JUDGE BROWN EXCEEDED HIS STATUTORY AUTHORITY, JURISDICTION AND DISCRETION UNDER SECTION 536.140 AND IS THEREFORE VOID, IN THAT SECTION 536.140 PROVIDES NO BASIS FOR A REVIEWING COURT TO DIRECT THAT AN ADMINISTRATIVE AGENCY MAKE FURTHER FINDINGS BASED ON THE RECORD PRESENTED TO JUDGE BROWN IN THE UNDERLYING CASE.

Respondent's remand was done in the absence of jurisdiction to remand and thereby was a nullity. *See, Yoder by Larson v. Horton*, 678 S.W.2d 901, 904 (Mo. App. E.D. 1984); *Peters v. United Consumers Club*, 786 S.W.2d 192, 193 (Mo. App. E.D. 1990). Based on the record presented, Respondent only had authority to affirm or reverse the Board's decision. Because Tendai could only show disparate treatment without any evidence of discriminatory conduct, Respondent should have affirmed the Board's Disciplinary Order as it did in all other aspects. Respondent certainly had no authority to remand for further fact-finding based on current Missouri law interpreting Section 536.140.4. Therefore, the circuit court's action in remanding was done without jurisdiction and was a nullity.

A. Judge Brown's Remand Contrary to Missouri Case Law.

In *Comfort v. County Council of St. Louis County*, 822 S.W.2d 460 (Mo. App. E.D. 1991), an appeal was taken from a decision of the circuit court remanding the case to the

County Council and subsequently affirming the County Council's grant of an amended conditional use permit to a hospital. The County Council had granted a conditional use permit to the hospital based on a municipal ordinance but had not made the ordinance a part of the record. The Court of Appeals held that Section 536.140.4 prohibited the trial court from remanding the matter to the agency. Apparently upon realizing that [the ordinance] was not in the record, the trial court remanded the case to the county council. The trial court reasoned that the record before it was incomplete . . . [and it could not] perform its duty of review without findings and conclusions on all of the contested facts heard by it. 822 S.W.2d at 462. The Eastern District noted that this Court has interpreted Section 536.140.4 to authorize:

The court to . . . remand the case to the agency with directions to reconsider the facts in light of such evidence *only* if the court finds either (a) the evidence could not have been produced in the exercise of reasonable diligence, or (b) the evidence was improperly excluded at the hearing before the agency. 822 S.W.2d at 462.

(822 S.W.2d at 462, citing *Consumer Contract Co. v. State Dept. of Rev.*, 592 S.W.2d 782, 787 (Mo. banc 1980)) (emphasis is the court's). The Eastern District held that the trial court only had authority to reverse the County Council's decision and had no authority under the statute to remand to the Council for the taking of additional evidence. *Id.*

B. Section 536.140 does not Authorize Remand in this Situation

There is no provision in Section 536.140 authorizing a judicial remand when the evidence was actually presented to the administrative agency and presumably considered. There is no provision in Section 536.140 which would support and justify the circuit court's purported remand in the present case. Under Section 536.140, RSMo 1994, a trial court

reviewing a petition for review of an administrative adjudication has the authority to reverse if the agency's action was arbitrary, capricious, unsupported to substantial evidence, unconstitutional, or an abuse of discretion. In reviewing the decision, the evidence and all reasonable inferences therefrom are to be viewed in the light most favorable to the Board. *State Board of Registration for the Healing Arts v. Masters*, 512 S.W.2d 150, 157-58 (Mo.App. 1974). The agency's action is affirmed if it was supported by substantial evidence upon the whole record. *State Board of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 441 (Mo.App. W.D. 1991). Section 536.140 provides for remand in certain specified cases only, such as when evidence was not considered which was reasonably available. Here, Tendai put extensive evidence in the record which the Board was clearly aware of as to the supposed lesser discipline on physicians in similar cases.

Under the statute, Respondent had the authority to reverse the Board's Disciplinary Order, if Tendai could prove disparate treatment with evidence of discriminatory intent. Here, Tendai did not present any evidence of discriminatory intent nor could such intent be inferred merely from the disparate treatment. Given the remainder of Respondent's Judgment and Opinion, he should have affirmed the Board's Disciplinary Order in its entirety. Respondent certainly did not have the statutory authority to remand and to order the Board to make findings of fact as to the differences in the cases.

C. Conclusion.

Relator Board acknowledges that there may be some inconsistent case law to support Respondent's authority to remand.² However, said case law would be inapplicable here. Respondent Circuit Court had enough evidence in the record to rule on Tendai's equal protection assertion without the necessity of remanding, so that this line of cases has no legal justification for a remand. *Comfort v. County Council of St. Louis County*, supra; *State ex rel. Clinton Area Vocation School v. Dandurand*, 766 S.W.2d 169 (Mo. App. W.D. 1989); *Big Piney v. MHTC*, 620 S.W.2d 66 (Mo. App. E.D. 1981). The Legislature has strictly limited the power of the circuit court to remand to an administrative board. Section 536.140 defines the scope of appellate review. *Hernandez v. State Bd. of Registration for Healing Arts*, 936 S.W.2d 894, 900 (Mo.App. W.D. 1997). A remand for the entry of factual findings based on evidence already in the record is not a remand authorized by the Legislature in Section 536.140.4. Respondent's action in remanding, taken in excess of his specific statutory authority, was in excess of his jurisdiction and therefore prohibited.

III. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE THE RELIEF SOUGHT HERE IS APPROPRIATE AND ADDITIONALLY THE PER CURIUM ORDER ENTERED IN THE UNDERLYING CASE BY THE MISSOURI SUPREME COURT DID NOT ADDRESS THE ISSUES RAISED HERE AND DOES NOT EXPRESSLY PROHIBIT THE RELIEF SOUGHT.

²See, e.g., *Sullivan County v. State Tax Comm'n*, 513 S.W.2d 452 (Mo. 1974); *Labrayere v. Goldberg*, 605 S.W.2d 79 (Mo. banc 1980).

A writ of prohibition is appropriate when there is an important question of law decided erroneously that would otherwise escape review . . . and the aggrieved party may suffer considerable hardship and expense as a consequence. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d at 557. For the reasons set forth in Points I and II, above, the Board contends that the action of Respondent Judge Brown meets this criteria. If relief is not afforded, given the fact that the Missouri Supreme Court has dismissed the appeal in the underlying case, Relator Board would incur hardship and expense. Most notably, the Board would be required to incur the time and the expense in preparing the additional findings of fact. This action would create a burden on the Board not required under law and would be ongoing in future disciplinary actions. Furthermore, the Board believes the Judge Brown's action is contrary to his statutory authority under Section 536.140, contrary to his jurisdiction, and contrary to the discretion afforded him. In such a situation, a proceeding in prohibition is appropriate. For all these reasons, the Board prays this Court will grant the relief sought.

The Board also contends that the Per Curium Order issued recently by the Missouri Supreme Court does not prohibit the relief sought. The Per Curium Opinion dismissed Tendai's appeal for lack of jurisdiction. It did not address the merits of his appeal. It simply noted that given the remand to the Board, the case was not final and therefore not appealable. The Board notes no express language in the Per Curium Opinion affirming the ability of the circuit court to remand for more fact findings. The Board disagrees with any assertion that there was an implicit determination that Judge Brown had the authority or the jurisdiction to take the action he did. Furthermore, in the event the this Court grants the relief, the underlying case would be final and at time appealable. As such, Tendai would still be afforded the opportunity to appeal his assertion that his Equal Protection rights were violated.

CONCLUSION AND REQUEST FOR RELIEF

Relator requests that this Court make permanent its Preliminary Order in Prohibition, entered on September 9, 2002, for the above-stated reasons and that Respondent's Motion to Dismiss be denied and that Respondent's Application for Transfer be denied. Additionally, Relator request that Respondent be directed to enter an Opinion and Judgment affirming the Board's Disciplinary Order in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief and appendix were mailed this ____ day of November, 2002, to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), Appellant hereby certifies that this brief includes the information required by Rule 55.03; complies with the limitations contained in Rule No. 84.06(b); and that, according to the word count feature in WordPerfect, the entire brief contains 6212 words and 638 lines of monospaced type. Appellant further certifies that, pursuant to Rule 84.06(f), it is filing with this brief a computer disk which contains a copy of the above and foregoing brief, which was prepared using WordPerfect 8.0, and Appellant also certifies that the disk has been scanned for viruses and is virus-free.

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